

***Frontiers of Legal Theory.* Richard Posner. Cambridge: Harvard University Press, 2001. 453 p. ISBN 0-674-00485-X. \$46.70 Reviewed by Matej Cepl, Graduate student in Boston, MA.**

This book should be read by all those who think about the possible reforms of the law and by all those who would like to think more thoroughly about what the law is and what the author thinks it should be. The aim of the book on its face is to present current state of the legal theory, which is understood by the author as something different both from the philosophy of law (“... concerned with the analysis high-level law-related abstractions such as legal positivism, natural law, legal hermeneutics, ...”) and from the analysis of legal reasoning. He states as a goal of such legal theory to create “tools essential for understanding and improving the system” and he considers as the most valuable contributions in such effort insights created by other social sciences, like economics, sociology, psychology, or history.

The main aim of the book seems to be in explaining the working of the law in terms of the philosophy of pragmatism as developed by the American thinkers of the early twentieth century. Author achieves this aim by both dispelling misconceptions about most commonly accepted sources of legal rules (author deals in this book expressly with the role of economical thinking, history, and psychology), and by explaining the role of the pragmatism in the legal (mainly judicial) discretion.¹ The role of pragmatism is crucial in understanding author’s position, which is very clearly influenced by the author’s experience as the circuit court justice. Therefore, legal theory is in the book constantly valued by the reference to legal practice.

For example, in the second part of the book author defends the cost-benefit analysis against its opponents. The author clearly admits, that this type of analysis should be strictly limited in its use for the positive conclusions, and states that the most opponents are mistaken when using the cost-benefit analysis for non-measurable and normative purposes. Although an example of positive conclusion, “a project

¹The author’s understanding of the pragmatism itself is more thoroughly described in his older book “Overcoming Law” (1995).

under consideration will save sixteen sea otters at a cost of \$1 million apiece” (p. 124) seems to be severely unfavorable to the poor creatures, the author claims, that when a government decides to save the animals because of other (mainly political) reasons, he “would have no basis for criticism”. However (and it is the main author’s sales-pitch for the cost-benefit analysis) without rational and objective cost-benefit analysis, decisions are uninformed and probably subject to prejudice, mass hysteria, and possibly even corruption by the pressure groups.

Again, pragmatic approach is used by the author in the third part of the book, dealing with the role of the historicist thinking on the legal theory, based mainly on the essay by Friedrich Nietzsche “On the Uses and Disadvantages of History for Life.”² Probably, this is the part which most heavily shows reliance on the author’s extensive personal experience of the actual work of justice in the United States. The author basically refuses a decisive role of the doctrine *stare decisis* and explains, that the judicial decision is only very lightly limited by precedents and the most important aim of the judge on the bench is support of (rather vaguely defined) welfare of the society, however he understands it. (p. 197) “We are casuists and pragmatists, [...] proceeding from the facts of specific disputes and from specific social policies, often of a *utilitarian cast*, rather than from general principles ...” Which is not say, that the author does not see any values in the precedents or theories. There are surely some values—mainly in terms of predictability of law, basic notion of fairness (same issue should be always decided in the same way), slight limitation on the judicial discretion, and he sees historical precedents as a wealthy resource of examples, which may inspire judge in his decisions. However, “the adoption of historicist rhetoric is a sure sign that the judge is not disclosing the true springs of decision.” (p. 168)

However, in order to understand more deeply the author’s philosophy, we need to consider the third part of the book (occupied with the relation between

²The wealth of the author’s knowledge of reference very unusual for legal thinkers is overwhelming. Aside from extensive use of Nietzsche’s essay (so much so, that this part of the book slightly resembles its review), he uses also references to Michel Foucault, Ludwig Wittgenstein, and others.

law and psychology), which is much more revealing in this aspect. In its begin the author gives a clue which can greatly help us to understand his opinions: “There are [...] two basic conceptions of economics. One focuses on subject matter, and holds economics to be the study of markets; the other focuses on method, and holds economics to be the application of the rational-actor model to human behavior.” (p. 225) Viewing all writing of the Judge Posner through prism of this statement, it is clear, that his economical thinking is predominantly of the latter kind. Actually, considering him being one of the founding fathers of the law & economics movement, it is surprising how little he is occupied (especially in his later books) with the issues that are of concern to the more mainline economists, like markets, contracts for sale, issues of corporate governance, etc.

Therefore, it may be said, that the biggest concern of the author in the third part of the book is to explain how the originally economists’ theory of rational-actor model applies to situations when actors decide ostensibly irrationally. Author firstly rejects whole idea of emotion as an phenomenon independent from reason and searches for a rational substance in the reactions which could be conventionally described as clearly emotional. According to the author (p. 227) “. . . emotion is a form of cognition.” Full discussion of this part of the book would clearly require more space than reasonable for this review, so I shall limit further discussion to the statements which lead me to the answers about the philosophy of whole book.

As stated above, the author stands philosophically firmly in the camp of pragmatism. For him the quest for truth is interesting only so far as it provides useful answers for the real life and real decision-making. Following this assumption he concludes, that the cost-benefit analysis is good, because although useless as tool of normative decisions, it at least provides to a politician information, which may lead to more reasonable conclusions. Again, in this part dedicated to the relation between psychology and law, he defense behavioral economics on the basis of its usefulness. Author argues quite strongly (see e.g., p. 263) from the pragmatic position about advantages of the concept of “rational utility maximizer”

concept of human behavior in similar fashion as in the previous part about usefulness of the cost-benefit analysis. When a scientific theory is evaluated solely on the amount of the answers to the real decision-making it can provide, both cost-benefit analysis and behavioral economics are clearly superior to any other more accurate but too complicated positions. So far it is hard to disagree. Similar arguments are standard defense of an assumptions standard economic theory, and it is clear that for limited purpose of the decision-making of businessmen, such simple if less accurate theories are much more useful than complicated and rather uncertain answers of the modern psychoanalytic psychology.

However, Judge Posner does not seem to be able to content himself with limited answers of the this approach. He is not just a pragmatic thinker, looking only for useful questions and rejecting everything else as non-useful mythical questions. He is a strong rationalist also, walking in the steps of the sixteenth and seventeenth centuries thinkers and trying to prove rational substance of everything seemingly irrational. He does so by stretching economists’ model of the “rational utility maximizer” into the universal model of human thinking. By doing so, he clearly shows limits of the model and sometimes has to deform reality into the mold of the economical man.

One example of such collision is on p. 231: “Unless you are kind of Christian rigorist who takes the Sermon on the Mount literally, as a guide of living in this world rather than (as it was intended) preparing for living in the a next world believed to be imminent, you will not think it immoral to hate Hitler or Stalin.” Such sweeping statement, trying to replace substantial part of two-thousand-years long efforts of the biblical hermeneutics (actually here both Christian as well as Jewish, because similar statements are in the Old Testament too) by new interpretation of one of the most important parts of Bible, when lacking any reference to literature or any further discussion, seems to me indicating one such rather desperate attempt to fit uncomfortably complicated world into simple theory. There are other such examples when the too limited theory leads the author into statements, which are hard to defend, like comparing jurors to children, because both “are more likely

to make emotional judgments than judges” (p. 229). However, the proper discussion of this aspect of the book exceeds the length of this review.

Finally, let me summarize the other parts of the book, which are not so directly related to the core of the author’s philosophy. The first chapter of the book is concerned with the explanation and defense of economical thinking in the legal reasoning. Author very thoroughly explains purpose and roots of the economical style of thinking and its links to the philosophy of utilitarianism and Jeremy Bentham. Then in the next chapter, the economical cost-benefit analysis is used on the issue of the decision when the freedom of speech should be protected and when the protection is limited (e. g., in case of commercial speech).

The fourth part of the book deals extensively with the issues surrounding relation between epistemology and the rules of evidence. Author after very thoughtful example of vantage over the “common sense” of journalist defending person sentenced for fraud. Then author very extensively deals with the issues surrounding the institution of jury in the American legal system.

In the last part of the book, standing relatively apart from the rest of the book, author develops a possible method of rather objective method of comparison between the performance of the different appellate courts by statistical analysis of the judicial statistical data.

Although the book may be very controversial in its discussion, I have found it very interesting to read, because author deals very thoroughly with the question for which the answers are usually just taken for granted and thought at all.